Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

CASINO VENTURES, INC.,

Petitioner,

vs.

ROBERT M. STEWART, SR., in his official capacity as Chief of the State Law Enforcement Division; and CHARLES M. CONDON, in his official capacity as Attorney General for the State of South Carolina,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE APPLICATION OF SOUTH CAROLINA'S GENERAL ANTI-GAMBLING LAWS TO PROHIBIT THE TRANSPORT AND POSSESSION OF GAMBLING DEVICES ON OCEANGOING SHIPS WHILE IN STATE WATERS CONFLICTS WITH, AND IS PREEMPTED BY, 15 U.S.C. § 1175(b)(1) TO THE EXTENT THAT THE FEDERAL STATUTE AUTHORIZES SUCH TRANSPORT AND POSSESSION.

II. WHETHER THE FOURTH CIRCUIT HAS ARTICULATED AND APPLIED A STANDARD OF PREEMPTION REVIEW THAT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

PARTIES TO THE PROCEEDINGS

There are no parties required to be noted by Rule 29.6 other than those listed in the caption. Petitioner, Casino Ventures, Inc., is a Florida corporation with no parent or subsidiaries.

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STATEMENT OF JURISDICTION

The judgment below was entered on July 6, 1999. An order denying a timely filed motion for rehearing was entered on August 2, 1999. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, Clause 2:

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

United States Code, Title 15, Section 1175 (1999):

Sec. 1175. Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited; exceptions

(a) General rule

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section of title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section of title 18, including on a vessel documented under chapter of title 46 or documented under the laws of a foreign country.

(b) Exception

(1) In general

Except as provided in paragraph (2), this section does not prohibit –

(A) the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States;

(B) the transport or possession, on a voyage, of a gambling device on a vessel that is within the boundaries of any State or possession of the United States, if –

(i) use of the gambling device on a portion of that voyage is, by reason of subparagraph (A), not a violation of this section; and

(ii) the gambling device remains on board that vessel while the vessel is within the boundaries of that State or possession; or

(C) the repair, transport, possession, or use of a gambling device on a vessel on a voyage that begins in the State of Indiana and that does not leave the territorial jurisdiction of that State, including such a voyage on Lake Michigan.

(2) Application to certain voyages

(A) General rule

Paragraph (1)(A) does not apply to the repair or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) of this paragraph if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

(B) Voyage and segment described

A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively –

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop within the boundaries of another State or possession of the United States or a foreign country.

(C) Exclusion of certain voyages and segments

Except for a voyage or segment of a voyage that occurs within the boundaries of the State of Hawaii, a voyage or segment of a voyage is not described in subparagraph (B) if it includes or consists of a segment –

(i) that begins and ends in the same State;

(ii) that is part of a voyage to another State or to a foreign country; and

(iii) in which the vessel reaches the other State or foreign country within 3 days after leaving the State in which it begins.

(c) Exception for Alaska

(1) With respect to a vessel operating in Alaska, this section does not prohibit, nor may the State of Alaska make it a violation of law for there to occur, the repair, transport, possession, or use of any gambling device on board a vessel which provides sleeping accommodations for all of its passengers and that is on a voyage or segment of a voyage described in paragraph (2), except that such State may, within its boundaries –

(A) prohibit the use of a gambling device on a vessel while it is docked or anchored or while it is operating within 3 nautical miles of a port at which it is scheduled to call; and

(B) require the gambling devices to remain on board the vessel.

(2) A voyage referred to in paragraph (1) is a voyage that –

(A) includes a stop in Canada or in a State other than the State of Alaska;

(B) includes stops in at least 2 different ports situated in the State of Alaska; and

(C) is of at least 60 hours duration.

STATEMENT OF THE CASE

In 1992, Congress took steps to assist America's shipping industry. Foreign flag cruise ships were able to enter United States territorial waters with gambling equipment on board, so long as the equipment wasn't in use at the time, but American vessels were not permitted to do so. This placed U.S. flagged vessels at a significant competitive disadvantage and contributed to the enormous disparity between the large number of foreign flag cruise ships serving American ports compared to the miniscule number of U.S. flag ships. *See* H.R. Rep. 102-357 [App. 34]

Congress acted to place United States cruise ships on an equal footing with foreign ships by amending the Johnson Act, 15 U.S.C. § 1175 (1990), which prohibited gambling aboard American vessels. The passage of P.L. 102-251 amended the Johnson Act in three ways. First, it lifted the Johnson Act ban on gambling aboard American ships on the high seas. Second, it required equal treatment of American and foreign vessels with respect to gambling. Third, it authorized ships that were on a voyage that included a segment on the high seas to transport or possess gambling devices while in a State's boundaries, provided that such devices remain on board the

ship while it is within the boundaries of such State. 15 U.S.C. § 1175(b)(1).

P.L. 102-251 specifically authorized the possession of gambling devices while in State boundaries on ships carrying passengers on cruises that begin and end in the same State, commonly referred to as "voyages-to-nowhere." As introduced, the bill that enacted P.L. 102-251 would have required a State to pass legislation affirmatively permitting possession of gambling equipment on "voyages-to-nowhere" as a prerequisite to the federal authorization. However, Congress amended the provision to "shift the burden"[1] and allow such possession unless:

> * * * the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment.

15 U.S.C. § 1175(b)(2)(A).

At the time of passage of P.L. 102-251, South Carolina had no law specifically prohibiting the transport or possession of gambling devices on vessels carrying passengers on voyages-to-nowhere or, for that matter, on maritime vessels under any circumstances. Subsequent to passage of P.L. 102-251, South Carolina enacted no new laws to impose such specific prohibitions. Nevertheless, the State announced its intention to prohibit the Petitioner from operating its business by threatening to enforce one or more of its general anti-gambling statutes.

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[1] House Report 102-357 (November 22, 1991) [App. 34]

Casino Ventures v. Stewart, 23 F.Supp.2d 647, 648 (D. S.C. 1998). [App. 14]

The Petitioner filed this action seeking a declaratory judgment that the application of South Carolina's general anti-gambling statutes to voyages-to-nowhere without passage of a law specifically directed at "voyage-to-nowhere" would conflict with, and be preempted by, the Johnson Act as amended. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. The District Court ruled for the Petitioner, finding that:

> South Carolina has not enacted any statute opting out of the 1992 amendments to the Johnson Act and the statutes South Carolina adopted prior to the 1992 amendments to the Johnson Act [citations omitted] do not meet the criteria of the opt out provisions of 15 U.S.C. § 1175 * * * .

Id. at 23 F.Supp.2d 652.

The Fourth Circuit Court of Appeals determined that, because the South Carolina statutes involved exercise of the State's police power, "respect for state prerogatives dictates a cautious preemption analysis," and reversed on July 6, 1999. *Casino Ventures v. Stewart*, 183 F.3d 307 (4th Cir. 1999). Rehearing was denied on August 2, 1999.

ARGUMENT

I

THE APPLICATION OF SOUTH CAROLINA'S GENERAL ANTI-GAMBLING LAWS TO PROHIBIT THE TRANSPORT AND POSSESSION OF GAMBLING DEVICES ON OCEANGOING SHIPS WHILE IN STATE WATERS CONFLICTS WITH, AND IS PREEMPTED BY, 15 U.S.C. § 1175(b)(1) TO THE EXTENT THAT THE FEDERAL STATUTE AUTHORIZES SUCH TRANSPORT AND POSSESSION.

The Fourth Circuit opinion ignored Congressional intent as clearly reflected in the language of P.L. 102-251 and its Congressional history, and crafted a rule of preemption analysis which overstates the deference to be accorded state law.

The Congressional intent embodied in P.L. 102-251 is not difficult to discern. It is reflected in the House Committee Report which accompanied the bill, comments on the floor of Congress, and the presumption that Congress did not intend to take meaningless action.

In language which has a significant bearing upon this case, the Committee Report which accompanied the bill discussed an important development in the amendatory process leading to enactment of P.L. 102-251:

> The second amendment changed the burden for State restrictions on voyages-to-nowhere. In the bill as reported from the Subcommittee, gambling could not occur on voyages-to-nowhere unless a State law specifically allows gambling to take place on these voyages. The amendment will allow gambling on voyages-to-nowhere

> unless the State from which the vessel is operating has a law specifically prohibiting those types of voyages; Hawaii has such a statute.

[App. 44-45]

Three references in the above statement are of utmost importance in determining Congressional intent. First, Congress reversed the provision from an "opt-in" requirement to an "opt-out" requirement in order to *change the burden* for state restrictions. The effect of the Circuit Court's decision is that Congress' action in amending P.L. 102-251 to shift the burden was rendered meaningless. At the time of the enactment, every coastal State in the United States, with one exception, had general anti-gambling laws that were materially indistinguishable from South Carolina's.[2] Consequently, virtually every State affected by P.L. 102-251 would automatically have been opted out upon passage of the act. In order for the new law to operate in any State, the burden would be on the State, not to opt out as intended by the amendment to the bill's language, but to opt in.

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[2] Ala. Code § 13A-12-27 (1991); Alaska Stat. § 11.66.260 1991); Cal. Penal Code, § 330b (1991); Conn. Gen. Stat. § 53-278c (1991); 11 Del. Code § 1405 (1991); Fla. Stat. § 849.231 (1991); Ga. Code § 16-12-24 (1991); Ma. Gen. Laws 271 § 5A (1991); 17-A Maine Rev. Stat. § 956 (1991); Md. Code 1957, Art. 27 § 264B (1991); Miss. Code § 97-33-7 (1991); N.H. Stat. § 647:2 (1991); N.J. Stat. 2C:37-7 (1991); N.C. Gen. Stat. § 14-299, 14-302 (1991); Pa. Stat. § 5513 (1991); R.I. Gen. Laws 1956 § 42-61.2-9, 11-19-18 (1991); S.C. Code 1976 § 16-19-50 (1991); Tex. Penal Code § 47.06 (1991); Va. Code 1950 § 18.2-331 (1991); Wash. Rev. Code 9.46.215 (1991).

Second, the Committee Report states that the P.L. 102-251 "would allow gambling on voyages-to-nowhere unless the State from which the vessel is operating has a law *specifically* prohibiting *those types of voyages.*" [emphasis supplied] Similar language was used in the Committee Report's analysis of the section of the act creating the waiver from the Johnson Act gambling prohibition:

> [T]his waiver does not apply to a vessel engaged on a voyage (or segment of a voyage) that begins and ends in the same State without an intervening stop in another State or foreign country if the State or possession from which the vessel is operating has a law *specifically* prohibiting the repair, transportation, possession, or use of gambling devices *on voyages that begin and end in that State.*

[emphasis supplied] The consistent reference to the necessity of a State enacting a law "specifically" prohibiting gambling on "voyages-to-nowhere" and "voyages that begin and end" in a State reflects a clear Congressional intent that a State wishing to exempt itself from P.L. 102-251 must enact a law particularly directed at gambling on voyages-to-nowhere.

The final version of the new law is in keeping with the Committee Report's emphasis on the necessity for specific state legislation. Section (b)(2)(A), which delegates authority to the States to prohibit possession of gambling devices, states that the authorization to transport or possess gambling devices while in state waters does not apply:

> * * * if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use *on that voyage or segment.*

[emphasis supplied] 15 U.S.C. § 1175(b)(2)(A).

A third element of the quoted language of the Committee Report is a powerful indicator of Congressional intent. The Report, referring to P.L. 102-251's amendment to the Johnson Act, states that:

> The amendment will allow gambling on voyages-to-nowhere unless the State from which the vessel is operating has a law specifically prohibiting those types of voyages; *Hawaii has such a statute.*

[emphasis supplied] Hawaii is the only State offered in the Report as an example of a State having a proper opt-out provision. At the time, Hawaii was also the only State that had a law *specifically* prohibiting gambling activity on a voyage-to-nowhere.[3] This was not the only reference

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[3] (1) A person commits the offense of promoting gambling aboard ships if the person knowingly advances or profits from gambling activity by:

* * *

(b) Managing, supervising, controlling, operating, or owning, either alone or in association with others, any craft which embarks from any point within the State, and disembarks at the same or another point within the State, during which the person intentionally causes or knowingly permits gambling activity to be conducted, whether within or without the waters of the State;

§ 712-1222.5, Hawaii Revised Statutes

to Hawaii's statute. It was discussed in considerably more detail in the Committee Report's general description of the effect of the P.L. 102-251:

> [G]ambling on so-called "voyages-to-nowhere" and voyages between two points in a State would be prohibited if the State from which they are operating has a law prohibiting gambling activities on these voyages. A "voyage-to-nowhere" is a voyage in which a vessel departs a place in the United States, sails to a point beyond the territorial sea, and returns to the same place.
>
> For example, the State of Hawaii has enacted a law (chapter 72 of the Hawaii Revised Statutes) prohibiting gambling activities on a vessel that embarks from any point within the State, and disembarks at the same or another point within the State, except on travel from the Continental United States or a foreign country. Therefore, under H.R. 3282, as amended, gambling would be prohibited on any U.S. or foreign-flag vessel that is on a voyage, or a segment of a voyage, that sails from a place in Hawaii and returns to that same place or that sails from one place in Hawaii to another place in Hawaii.

[App. 41]

One cannot ignore the Committee Report's emphasis upon Hawaii's unique statute and do justice to Congressional intent. We must assume that Congress was aware of the fact that all coastal States had laws generally prohibiting gambling. If Congress intended these laws to be sufficient to opt out of P.L. 102-251, no reference to

Hawaii, much less a detailed description of its statute, would have been necessary.

Article VI of the United States Constitution declares that constitutionally enacted laws of the United States shall be the "supreme law of the land," and this Court has unswervingly recognized the predominance of federal law when Congress acts within its jurisdiction. Even when there is concurrent federal and state authority, once Congress "has exercised its power, there remains in the States no authority to legislate on the same matter." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 116 S.Ct. 1103, 134 L.Ed.2d 237 (1996).

The test for preemption analysis, often repeated by this Court, was articulated in *Perez v. Campbell*, 402 U.S. 637, 649, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971):

> Three decades ago Mr. Justice Black, after reviewing the precedents, wrote in a similar vein that, while '(t)his Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, ha(d) made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference (,) * * * (I)n the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). Since *Hines* the Court has frequently adhered to this articulation of the meaning of the Supremacy Clause.

South Carolina's general prohibitions on gambling, if applicable to possession of gambling devices on voyages-to-nowhere, would "stand as an obstacle" to P.L. 102-251 in two respects. First, it would utterly frustrate the general purpose and objective of P.L. 102-251 to allow American cruise ships greater freedom to offer gambling to their passengers. It would do so because the authorization to possess gambling devices at the point of embarkation and disembarkation would be dead on arrival due to the existence of general anti-gambling statutes in every coastal State. Second, it would reverse Congress' expressed intent to place the affirmative burden upon States to specifically prohibit gambling on voyages-to-nowhere.

II

THE FOURTH CIRCUIT HAS ARTICULATED AND APPLIED A STANDARD OF PREEMPTION REVIEW THAT IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The decision of the Circuit Court did not adhere to the *Hines* preemption analysis. The court failed entirely to address Section (b)(2)(A) of the federal statute which provided the States with "limited delegation"[4] to prohibit gambling devices on voyages-to-nowhere. It failed to do so despite the fact that Congressional intent behind Section (b)(2)(A) is the core of the preemption issue. While the Court made reference to Committee Report 102-357, it ignored entirely the amendatory language which shifted

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[4] App. 42.

the burden on the States from an opt-in to opt-out requirement, the Report's extensive discussion of the requirement for State legislation "specifically" addressed to voyages-to-nowhere, and the detailed discussion of Hawaii's unique statute which is specifically addressed to such voyages.

The Circuit Court made no effort to determine whether application of South Carolina's general anti-gambling laws would conflict with the particular language of Section (b)(2)(A) or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of P.L. 102-251. Instead, having determined that "respect for state prerogatives" in the execution of police powers required a "cautious preemption analysis," the court engaged in a general discussion of Congress' perceived concern over "cooperative federalism and respect for dominant state interests," *Casino Ventures v. Stewart, supra* at 183 F.3d 313. The court also focused its attention largely on illustrating why there was no field preemption, an indisputable conclusion since Congress, by granting a "limited delegation" to the States, obviously did not intend to occupy the entire field of maritime gambling.[5]

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[5] The court supported its conclusion that there was no field preemption by noting that P.L. 102-251 exempted the State of Alaska. The court reasoned that if the new law preempts States from criminalizing the transport and possession of gambling devices on all vessels, "there would be no need to add an exception explicitly forbidding Alaska from banning transport and possession." *Id.* at 183 F.3d 312. The Alaska exception was included to withhold from that State even the "limited delegation" otherwise granted. Whereas other States can

This Court has stated that it will be presumed that Congress did not intend to interfere with a State's exercise of the police power unless the language or history of the federal act clearly indicates such intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). The Court has never suggested that exercise of the police power affords a state statute any degree of immunity from preemption or justifies a less careful evaluation of whether or not the statute obstructs Congress' objectives.

The distinction is important. This Court has made clear that the nature of the State power being exercised does not change the State's prerogatives vis-à-vis federal authority and the Court has never suggested that it reduces the court's obligation to carefully analyze the language and history of the affected provisions to determine whether there is conflict. Thus, even while recognizing that community property laws "implement policies and values lying within the traditional domain of the States," the Court, holding that ERISA preempted such laws to the extent of conflict, noted that its review would "begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects." *Boggs v. Boggs*, 520 U.S. 833, 841, 117 S.Ct. 1754, 1760, 138 L.Ed.2d 45 (1997).

In *Medtronic, Inc. v. Lohr, supra* at 518 U.S. 470, 485, 116 S.Ct. 2240, 2250, the Court defined the obligation of

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continue to prohibit gambling on voyages-to-nowhere by enacting specific legislation, Alaska cannot prohibit it at all.

the reviewing court even in a case involving exercise of a State's police power:

> * * * "the purpose of Congress is the ultimate touchstone" in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a "fair understanding of congressional purpose." Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. Also relevant, however, is the "structure and purpose of the statute as a whole" as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

[citations omitted]

It was not necessary in this case to determine whether or not Congress intended to preempt state law with respect to voyages-to-nowhere. P.L. 102-251 expressly addresses preemption when it grants to the States a "limited delegation" to create an exception. The only issue was what Congress intended States to do in order to except themselves. The circuit court failed to address that issue, apparently in the belief that the fact that police powers were involved clothed state action in some heightened degree of immunity from federal interference or reduced the reviewing process to a cursory level.

CONCLUSION

The Court is urged to grant certiorari in this matter for two reasons. First, the result of the Circuit Court opinion is the operation of State law to completely frustrate Congress' objective in passing P.L. 102-251.

Second, the Fourth Circuit has articulated and applied a standard of review that conflicts with decisions of this Court and that would raise the bar for federal preemption. It is important for the Court to clarify the fact that the general presumption that Congress does not intend to interfere with state police powers does not reduce the reviewing court's obligation to determine Congress' intent in a given case, and to ensure that the state law is not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra.*

Respectfully submitted,

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CASINO VENTURES, Plaintiff-Appellee,
v.
Robert M. STEWART, in his official capacity as Chief of the State Law Enforcement Division; Charles M. Condon, Attorney General, Defendants-Appellants.

No. 98-2653.
United States Court of Appeals,
Fourth Circuit.

Argued: May 7, 1999.
Decided: July 6, 1999.

ARGUED: Nathan Kaminski, Jr., Senior Assistant Attorney General, Columbia, South Carolina, for Appellants. Edward A. Frazier, Edward A. Frazier, P.A., Columbia, South Carolina, for Appellee. ON BRIEF: Charles M. Condon, South Carolina Attorney General, Robert D. Cook, Assistant Deputy Attorney General, Christie Newman Barrett, Assistant Attorney General, Columbia, South Carolina, for Appellants.

Before WILKINSON, Chief Judge, NIEMEYER, Circuit Judge, and MOON, United States District Judge for the Western District of Virginia, sitting by designation.

Reversed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge NIEMEYER and Judge MOON joined.

OPINION

WILKINSON, Chief Judge:

Casino Ventures plans to offer gambling cruises from a port in South Carolina. Fearing prosecution, it brought

suit seeking a declaration that state gambling laws prohibiting such cruises had been pre-empted by the Johnson Act, 15 U.S.C. § 1175. The district court found the state laws were preempted. *Casino Ventures v. Stewart*, 23 F.Supp.2d 647, 649 (D.S.C.1998). We reverse, holding that the Act does not preempt state regulatory authority over gambling. Thus South Carolina authorities remain free to enforce state criminal prohibitions against illicit gambling cruise activity.

I.

Casino Ventures seeks to operate a "day cruise" or "cruise to nowhere" business from a dock in South Carolina. The business would entail short cruises on ships that depart from and return to the same port in South Carolina without making any intervening stops. Once the ship is outside of the state's territorial waters, Casino Ventures would offer gambling to its passengers.

Casino Ventures fears that its cruise business will violate South Carolina criminal laws restricting gambling. State statutes have long prohibited the possession and use of certain gambling devices within South Carolina territory. In particular, Casino Ventures alleges that its business operations may violate South Carolina's ban on lotteries, S.C. Code Ann. §§ 16-19-10 to -30, its ban on unlawful games and betting, *id.* §§ 16-19-40, 16-19-130, and its ban on the possession and use of gaming tables and machines, *id.* §§ 12-21-2710, 12-21-2712, 16-19-50, 16-19-120.

To allay this fear of criminal prosecution, Casino Ventures brought suit against Robert M. Stewart, Chief of

the State Law Enforcement Division, and Charles M. Condon, Attorney General of South Carolina. Casino Ventures sought a declaration that South Carolina's gambling laws are preempted by federal law and an order enjoining the enforcement of those state laws. Specifically, it asserted that the 1992 amendments to the Johnson Act created a federal right to operate a gambling cruise to nowhere. Pub. L. 102-251, § 202, 106 Stat. 60, 61-62 (1992).

The 1992 amendments altered the Johnson Act's general ban on maritime gambling. Prior to the amendments, it was "unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . within the special maritime" jurisdiction of the United States. 15 U.S.C.A. § 1175 (1990). The Justice Department, however, interpreted this prohibition not "to apply to foreign-flag vessels entering the United States." H.R. Rep. No. 102-357 (1991). The effect was that American flag vessels were restricted from offering gambling to their passengers while foreign flag vessels were free to do so. This put American flag vessels at a competitive disadvantage in the lucrative leisure cruise industry. *See id.*

Congress reacted to the disparity by amending the Johnson Act to make clear that it applied to vessels "documented under the laws of a foreign country." 15 U.S.C. § 1175(a). Additionally, Congress crafted exceptions to the Johnson Act's blanket restrictions related to gambling devices. First, section 1175 no longer restricts the transport and possession of gambling devices on vessels, provided that those devices are not used while the vessel is within the boundaries of a state or possession of the United States. *Id.* § 1175(b)(1)(A)-(B). Second, section 1175 no longer prohibits the repair and use of gambling

devices outside of those boundaries, unless the ship is on a cruise to nowhere and the state in which that cruise "begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage." *Id.* § 1175(b)(1)(A), (b)(2).

After examining these amendments, the district court granted Casino Ventures' request for a declaratory judgment. First, the court held that the 1992 amendments created a federal right to operate day cruises, thereby preempting conflicting state laws. *Casino Ventures*, 23 F.Supp.2d at 649. Second, the court noted that under section 1175a state could defeat preemption if it "has enacted a statute the terms of which prohibit that repair or use" on cruises to nowhere. 15 U.S.C. § 1175(b)(2)(A). But it found that South Carolina's existing laws restricting gambling did not meet this statutory requirement because they were not passed after the 1992 amendments took effect. *Casino Ventures*, 23 F.Supp.2d at 649-50. Thus, the district court declared that Casino Ventures could lawfully operate a cruise to nowhere business in South Carolina. *Id.* at 652. Stewart and Condon appeal. Because we hold that the district court's initial finding of federal preemption was erroneous, we reverse.[1]

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[1] By reversing on preemption grounds, we need not reach the district court's ruling that a state must reenact its laws against gambling in order to make it a federal crime to operate a gambling cruise to nowhere. *See* 15 U.S.C. § 1175(b)(2)(A).

II.

Although the Constitution plainly permits federal law to supplant state authority, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981); *see also Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1305 (4th Cir.1992). This presumption is at its zenith when federal law impinges upon core state police powers. States have long possessed primary responsibility in our federal system to protect the health, welfare, safety, and morals of their citizens. The Supreme Court has indicated "that when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)); *see also Reid v. Colorado*, 187 U.S. 137, 148, 23 S.Ct. 92, 47 L.Ed. 108 (1902). This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996).

The state laws at issue in this case restrict gambling within South Carolina. Because such restrictions are aimed at promoting the welfare, safety, and morals of South Carolinians, they represent a well-recognized exercise of state police power. *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S.Ct.

2968, 92 L.Ed.2d 266 (1986). For this reason, respect for state prerogatives dictates a cautious preemption analysis – one which is reluctant to imply a broad ouster of state authority.

III.

Neither party contends that Congress has expressly preempted the state laws at issue here. Instead, Casino Ventures argues that state laws banning the use and possession of gambling devices on vessels have been impliedly preempted by federal law. Casino Ventures asserts that the 1992 amendments to the Johnson Act worked an implicit preemption of state laws, such as South Carolina's, that prohibit gambling voyages to nowhere.

We disagree. "The purpose of Congress is the ultimate touch stone" in a preemption case. *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963). That being so, state law is preempted "if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (internal quotation marks omitted). Additionally, courts imply preemption if state law "actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 78 L.Ed.2d

443 (1984) (citation omitted); *see also Worm*, 970 F.2d at 1304.

A.

There is no basis for finding federal field preemption of South Carolina's restrictions on gambling. Maritime matters and gambling are not fields subject to exclusive federal control. To the contrary, federal law in these fields respects both our system of dual sovereignty and the important regulatory interests of the states.

As a general matter, "Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 374, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

This is also true of the regulation of gambling. Indeed, Congress has explicitly recognized the preeminent state interests in controlling gambling and has sought to extend, not curb, state police power in this field. Congress has done so by delegating to the states significant authority to shape applicable federal law. For example, it is a federal crime "to transport any gambling device to any place in a State." 15 U.S.C. § 1172(a). But such activity is not a federal crime if a state so chooses: each state may change the content of this federal law simply by "enact[ing] a law providing for the exemption of such State from the provisions of this section." *Id.* Similarly, it is a federal crime for a person engaged in the business of betting to knowingly use wire communications to transmit bets interstate. 18 U.S.C. § 1084(a). But

Congress has decided not to make that conduct illegal if both the transmitter and receiver of such information are located in states that have legalized such betting. *Id.* § 1084(b). In each case, Congress has acted in aid, not in derogation, of state regulatory authority.

Likewise, the combined field of maritime gambling leaves room for state regulation. In fact, Congress initially enacted the Johnson Act "to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such States." H.R. Rep. No. 81-2769 (1950). In that supporting role, Congress expressly did not apply 15 U.S.C. § 1175 to state territorial waters. By its terms, section 1175 applies only to vessels "within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18." 15 U.S.C. § 1175(a). The special maritime jurisdiction of the United States specifically excludes waters subject to the control of state authorities. 18 U.S.C. § 7(1) (special maritime jurisdiction includes the high seas and "any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State" (emphasis added)); *see also United States v. Tanner*, 471 F.2d 128, 141 (7th Cir.1972) (noting that under 18 U.S.C. § 7(1) "there can be no concurrent federal and state jurisdiction"); 2 Benedict on Admiralty § 112(a)[1] (7th rev. ed.1998).[2]

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[2] The special maritime jurisdiction of the United States does include some state territorial waters. *See* 18 U.S.C. § 7(2) (including United States flag vessels on the St. Lawrence River,

Additionally, by enacting section 1175 Congress extended the reach of state police power beyond state territorial waters: that provision permits states to change the content of federal law with respect to cruises to nowhere. Although the 1992 amendments to the Johnson Act generally permit the use of gambling devices on the high seas, they permit states to reverse course and opt to have cruising to nowhere remain a federal crime. 15 U.S.C. § 1175(a)-(b). Cruises to nowhere remain a federal crime if a state "has enacted a statute the terms of which prohibit" the use of gambling devices on such cruises. *Id.* § 1175(b)(2)(A).

Section 1175 – which expressly withdraws federal regulation from state territorial waters and permits states to determine the content of federal law outside of those waters – recognizes the vital state regulatory interests in gambling controls. From this we cannot conclude that maritime gambling is a field "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (internal quotation marks omitted). The criminal regulation of gambling, even gambling taking place within the admiralty and maritime jurisdiction of the United States, is simply not a field over which Congress has sought exclusive regulatory authority and the displacement of state law.

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the Great Lakes, and on any waters connecting the Great Lakes). Those waters, however, are not at issue in this case.

B.

Nor do we find that South Carolina's laws conflict with the federal statute at issue here. As noted, the plain language, structure, and purpose of section 1175 is completely at odds with preemption. That federal enactment does not even apply to South Carolina's territorial waters – it leaves regulation of those waters to the state. 15 U.S.C. § 1175(a); 18 U.S.C. § 7(1). This alone leads to the conclusion that state and federal laws are not in conflict. But the statute goes even further. It criminalizes gambling cruises to nowhere outside of a state's territorial waters if a state enacts a law banning them. 15 U.S.C. § 1175(b)(2). By permitting states to adjust the contours of federal law, section 1175 augments state authority. In fact, the entire theme of this statute is one of cooperative federalism and respect for dominant state interests. Nothing leads to the conclusion that federal law has supplanted South Carolina's regulatory authority over gambling.

Further, preemption was not an issue that Congress overlooked. The very statute at issue in this case contains an express provision preempting the gambling laws of Alaska on certain voyages. It states that

> With respect to a vessel operating in Alaska, this section does not prohibit, nor may the State of Alaska make it a violation of law for there to occur, the repair, transport, possession, or use of any gambling device on board a vessel which provides sleeping accommodations for all of its passengers. . . .

15 U.S.C. § 1175(c)(1). This is strong evidence that Congress did not wish to extend preemption any further: "When Congress has considered the issue of preemption

and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to preempt state laws from the substantive provisions of the legislation." *Cipollone*, 505 U.S. at 517, 112 S.Ct. 2608 (citation and internal quotation marks omitted); *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 287-89, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

Moreover, this express exception would be unnecessary if Casino Ventures' reading of the statute were correct. Casino Ventures asserts that the statute not only legalizes as a matter of federal law, but also preempts states from criminalizing, the transport and possession of gambling devices on all vessels. But if this were so, there would be no need to add an exception explicitly forbidding Alaska from banning transport and possession. If Casino Ventures' reading were correct, states were already preempted from interfering with those activities. The Alaska exception only makes sense if states are not generally preempted from barring the possession and transportation of gambling devices within their territorial waters.

Finally, allowing states to make their own regulatory choices about gambling does not interfere with the purpose of the 1992 amendments. Before the amendments, foreign flag ships were permitted to offer gambling on the high seas while American vessels were forbidden from doing so. By amending the Johnson Act, Congress sought to place all vessels on equal footing. Congress never suggested that it was legislating to remedy an inefficient patchwork of varied state laws. *See* 1 Thomas J.

Schoenbaum, Admiralty and Maritime Law § 4-5 (2d ed.1994); *see also Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1422 (9th Cir.1990). Instead, the amendments sought only to put an end to the discriminatory treatment of United States flag vessels under federal law.

The committee reports and floor statements speak only to this purpose. H.R. Rep. No. 102-357 (1991) ("The clear intent and purpose of this amendment to the Johnson Act is to allow those activities on U.S.-flag vessels to the same extent that they are currently allowed on foreign-flag vessels."); 138 Cong. Rec. H71 (daily ed. Jan. 28, 1992) (statement of Rep. Davis) (same); *id.* at H70 (statement of Rep. Jones) (The law "will enable our U.S. vessels to operate on a level playing field with foreign flag cruise ships with respect to gambling."). And Congress explicitly recognized that state laws regulating gambling would continue to operate. 138 Cong. Rec. H72 (daily ed. Jan. 28, 1992) (statement of Rep. Lent) ("This bill preserves the right of a coastal State to enact legislation that prohibits gambling on a vessel that operates from a port of that State even if the vessel sails from that port out into international waters and then returns to the same port."). Representative Lent made it clear that federal law was not ousting the authority of states to prohibit and regulate gambling. He noted that "The committee was aware that a number of coastal States do not want gambling on vessels in their waters and this legislation retains the right of States to continue to prohibit gambling." *Id.*

For all of these reasons, we join those courts that have rejected the argument that 15 U.S.C. § 1175 preempts state laws prohibiting gambling and gambling devices. *Padavan v. City of New York*, 685 N.Y.S.2d 35,

35-36 (N.Y.App.Div.1999) (rejecting the assertion that the 1992 amendments preempt local regulation); *Butterworth v. Chances Casino Cruises, Inc.*, 1997 WL 1068628, at *4 (M.D.Fla.) (holding that section 1175 does not completely preempt state gambling device laws). The lifting of federal restrictions on gambling outside state territorial waters does not preempt state gambling prohibitions within those waters. States remain free to regulate gambling within their territorial waters.

IV.

Casino Ventures suggests that in amending the Johnson Act, Congress prohibited states from exercising their core police powers to ban gambling and gaming devices. We do not agree. States have long regulated in this area. And state primacy here has only been reinforced by congressional enactments, including the one before us, which grant states significant control over the substance of federal criminal laws dealing with gambling. Far from expressing the required "clear and manifest" purpose to displace state authority, Congress has voiced a desire to retain and defer to state choices in this area. Implying preemption here would defeat, not advance, these federal objectives. For this reason, the judgment of the district court is hereby

REVERSED.

CASINO VENTURES, Plaintiff,

v.

Robert M. STEWART, Sr. in his Official Capacity as Chief of the State Law Enforcement Division, and Charles M. Condon, in his Official Capacity as Attorney General for the State of South Carolina, Defendants.

No. 2:98-1923-18.

United States District Court,
D. South Carolina,
Charleston Division.

Oct. 16, 1998.

Edward A. Frazier, Columbia, SC, for Plaintiff.

Nathan Kaminski, Jr., Columbia, SC, for Defendant.

ORDER

NORTON, District Judge.

Oh, we got trouble –

Right here in Georgetown County.
We've surely got trouble –
Right here in Georgetown County.
Oh yes we got trouble here,
We got big, big trouble.
With a capital "T" –
And that rhymes with "G"
And that stands for gambling.[1]

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[1] Adapted from Meredith Willson, Ya Got Trouble as performed in the Broadway musical, The Music Man (1957). With this song, Harold, a main character in the play, warned the River City townspeople of the potential trouble they faced with

This case arises out of Plaintiff's intention to operate a "day cruise" or "cruise to nowhere" business in Georgetown County, South Carolina. After denying Plaintiff's motion for a preliminary injunction, this court held a bench trial on September 14, 1998. At the conclusion of the trial and in accordance with Fed.R.Civ.P. 52(a), this court now makes the following findings of fact and conclusions of law.

I. BACKGROUND

Plaintiff filed a declaratory judgment action and a motion for a preliminary injunction and supporting memorandum on July 1, 1998. Defendants filed a motion to dismiss and a motion in opposition to Plaintiff's request for a preliminary injunction on July 10, 1998. Both parties argued their positions at a hearing on July 13, 1998. By order dated July 21, 1998, this court denied Plaintiff's motion.

Plaintiff operates a day cruise business in Mayport, Florida. Day cruises or "cruises to nowhere" are voyages that start and finish in the same port without any stops. The main purpose of these cruises is to offer casino style gambling to passengers once the vessel sails beyond a state's three mile territorial waters.

Plaintiff desires to begin an operation similar to its Florida business in Georgetown County, South Carolina. Plaintiff seeks an order from this court declaring its right

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the recently opened pool hall. The court apologizes to Meredith Willson for the liberties taken with his song.

to legally operate a day cruise business in South Carolina. Plaintiff further requests that this court enjoin Defendants from arresting any of its officers, agents, or employees or from confiscating any of Plaintiff's equipment when the Plaintiff commences business in South Carolina.

II. FINDINGS OF FACT

Pursuant to the joint stipulation of the parties, this court makes the following findings of fact.

1. Plaintiff intends to operate day cruises that would begin and end within South Carolina territory, which includes its three mile territorial waters, as shown on NOAA Map # 11535.

2. A day cruise is a cruise that begins and ends at the same port and does not make any intervening stops to disembark passengers.

3. Once the day cruise is beyond South Carolina territory, Plaintiff would offer gambling as one of the amenities for its passengers. To offer this amenity, Plaintiff would be possessing and transporting within South Carolina territory gambling equipment of the following type: (a) Black Jack Tables; (b) Craps Tables; (c) Roulette Wheel; (d) Poker Tables; and (e) Slot Machines.

4. Plaintiff is authorized to do business in South Carolina.

5. Dewayne Williams, the sole shareholder of Plaintiff, has paid for an option to lease dock and shore facilities, including parking, in South Carolina. In the event that Plaintiff is permitted to begin its day cruise operation in South Carolina, Dewayne Williams or Plaintiff may exercise

the option to lease the dock and shore facilities. Plaintiff has renovated its ship and otherwise prepared for operations.

6. Plaintiff has registered for Calendar Year 1998 with the Department of Justice under the Johnson Act.

7. South Carolina has not enacted a statute that references the Johnson Act.

8. Defendants intend to prohibit Plaintiff from operating its business by threatening to enforce one or more of the following South Carolina statutes: S.C.Code Ann § 12-21-2710; S.C.Code Ann. § 12-21-2712; S.C.Code Ann. § 16-19-10; S.C.Code Ann. § 16-19-20; S.C.Code Ann. § 16-19-30; S.C.Code Ann. § 16-19-40; S.C.Code Ann. § 16-19-50; S.C.Code Ann. § 16-19-120; and S.C.Code Ann. § 16-19-130.

III. CONCLUSIONS OF LAW

Oh, we got trouble –
Right here in Georgetown County.
We've surely got trouble –
Right here in Georgetown County.
Oh yes we got trouble here,
We got big, big trouble.
With a capital "T" –
And that rhymes with "C"
And that stands for Congress.

A. THE JOHNSON ACT: 15 U.S.C. § 1175.

Congress enacted amendments to 15 U.S.C. § 1175 in 1992. The 1992 amendments created an exception to then existing prohibitions on possession and use of gambling

devices on U.S. flag ships. Under the exception, it is lawful to transport or possess, on a voyage, a gambling device that is "within the boundaries of any State or possession of the United States" if the use of the gambling device on a portion of the voyage is not within the boundaries of any State or possession of the United States and the device remains on board while the vessel is within such boundaries. 15 U.S.C. § 1175(b)(1). Congress further provided that the repair, transport, possession, or use of a gambling device on a vessel that is not within the boundaries of any State or possession of the United States is prohibited "if the State or possession of the United States in which the voyage or segment begins and ends has enacted a statute the terms of which prohibit that repair or use on that voyage or segment." 15 U.S.C. § 1175(b)(2)(A). Accordingly, any state that "has enacted" a statute that prohibits the repair or use of gambling equipment on voyages that begin and end in the same state without any intervening stops may prohibit the type of business Plaintiff proposes. *See Id.*

Under the express language of § 1175, Plaintiff has the right to operate day cruises from ports in South Carolina unless South Carolina has opted out of the statute. *Id.* The parties agree that South Carolina has not enacted a statute that references the Johnson Act. Additionally, none of the pre-existing statutes on which Defendants rely[2] reference the Johnson Act or contain a

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[2] Defendants assert that the following South Carolina statutes prohibit Plaintiff's possession of gambling devices: S.C.Code Ann § 12-21-2710; S.C.Code Ann. § 12-21-2712; S.C.Code Ann. § 16-19-10; S.C.Code Ann. § 16-19-20; S.C.Code

prohibition on the use of gambling devices on a voyage or segment of a voyage as set forth in section 1175(b)(2)(A) and (B). Under the plain language of § 1175, Plaintiff may operate his business in South Carolina.

> Oh, we got trouble –
> Right here in Georgetown County.
> We've surely got trouble –
> Right here in Georgetown County.
> Oh yes we got trouble here,
> We got big, big trouble.
> With a capital "T" –
> And that rhymes with "P"
> And that stands for precedent.

B. FOURTH CIRCUIT PRECEDENT

Statutory interpretation begins with the language of the statute. *Randall v. Loftsgaarden*, 478 U.S. 647, 656, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986). Faced with interpreting the "has enacted" language of the Johnson Act before its 1992 amendments, the Fourth Circuit concluded that "[s]ince no state could possibly exempt itself from the prohibition of the Johnson Act before its passage, the words 'has enacted' cannot reasonably be deemed to have contemplated prior existing state legislation." *North Beach Amusement Company v. United States*, 240 F.2d 729 (4th Cir.1957). As the Supreme Court recently noted, "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson v. Alloyd*

Ann. § 16-19-30; S.C.Code Ann. § 16-19-40; S.C.Code Ann. § 16-19-50; S.C.Code Ann. § 16-19-120; and S.C.Code Ann. § 16-19-130.

Co., Inc., 513 U.S. 561, 562, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). Because South Carolina has not enacted any legislation referencing the Johnson Act specifically or in substance, South Carolina has not "enacted a statute the terms of which prohibit" day cruises. Defendants' argument that existing South Carolina statutes effectively opt South Carolina out of § 1175 is contrary to the Fourth Circuit's decision in North Beach.

Defendants argue that despite North Beach, Congress only intended its 1992 amendments to the Johnson Act to lift existing federal prohibitions on gambling aboard U.S. flag ships. Defendants point to Hawaii and argue that the continued validity of Hawaii's pre-1992 prohibition of day cruises evidences Congress's intent to allow existing statutes to effectively opt a state out of the 1992 amendments to the Johnson Act.

Defendants' attempt to expand upon Hawaii's unique situation is misplaced. The 1992 amendments to the Johnson Act specifically reference Hawaii. 15 U.S.C. § 1175(b)(2)(C). There is no similar reference to South Carolina. *Id.* Moreover, South Carolina has no statute even remotely similar to Hawaii's statute. Compare Haw.Rev.Stat. § 712-1222.5 with S.C.Code Ann. § 12-21-2710; S.C.Code Ann. § 12-21-2712; S.C.Code Ann. § 16-19-10; S.C.Code Ann. § 16-19-20; S.C.Code Ann. § 16-19-30; S.C.Code Ann. § 16-19-40; S.C.Code Ann. § 16-19-50; S.C.Code Ann. § 16-19-120; and S.C.Code Ann. § 16-19-130 (noting Hawaii's specific reference to crafts that embark and disembark at the same port within the state's borders and the lack of any similar provision in any of South Carolina's statutes).

Because Congress's 1992 amendments to the Johnson Act do not mention South Carolina, and because none of South Carolina's existing gambling statutes are similar to Hawaii's statute, Hawaii and South Carolina are not analogous. Congress did not intend for South Carolina to get the special treatment that it afforded Hawaii. South Carolina's statutes generally prohibiting gambling do not prohibit the operation of day cruises.

> Oh, we got trouble –
> Right here in Georgetown County.
> We've surely got trouble –
> Right here in Georgetown County.
> Oh yes we got trouble here,
> We got big, big trouble.
> With a capital "T" –
> And that rhymes with "C"
> And that stands for coastal states.

C. COASTAL STATES

1. CALIFORNIA

Immediately after the adoption of the 1992 amendments to the Johnson Act, California enacted legislation to opt out of the amendments. *See* Cal.Penal Code § 11319. The California legislature specifically enacted section 11319 to meet the narrow exception of the 1992 Johnson Act amendments. The Legislative Intent comment to California's statue [sic] reads:

> SECTION 1. It is the intent of the Legislature in enacting this bill to reinforce long-standing statutory prohibitions against gambling ships that operate in California waters or from California ports. Consistent with these prohibitions under

> existing law . . . it is the intent of the Legislature to reiterate that gambling activities . . . are prohibited on craft where voyages begin and end in waters of this state, consistent with the standards specified in Public Law No. 102-251, Sec. 202(b)(1)(2)(A) (15 U.S.C. 1175). Therefore, this legislation buttresses current law that prohibits gambling activities on so-called "voyages to nowhere," that are conducted entirely intrastate and in California waters.

Cal.Penal Code § 11319. Like South Carolina, California had existing gambling statutes prior to Congress's 1992 amendments to the Johnson Act. When adopting the 1992 amendments, Congress afforded California's existing statutes the same recognition as South Carolina's existing statutes: none. Accordingly, California lawmakers acted swiftly to prevent the day cruise industry from establishing businesses in California. California adopted a simple, short statute to meet the narrowly drawn exception of 15 U.S.C. § 1175. South Carolina lawmakers have yet to take similar measures to opt out of the 1992 amendments to the Johnson Act.

2. FLORIDA

Defendants cite *Butterworth v. Chances Casino Cruises*, Case No. 97-846-CIV-J-20 (M.D.Fla. July 14, 1997), to support their argument. *Butterworth* is irrelevant to Defendants' position. In *Butterworth*, the Florida Attorney General filed a nuisance action in Florida State Court against a day cruise operator. The Defendant removed the case to federal court alleging that the court had federal question jurisdiction over the claim. As is the practice in

removed cases, the court looked to the face of the complaint to evaluate its jurisdiction. *See* 28 U.S.C. § 1331; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Lacking jurisdiction, the federal court remanded the case to the Florida state court. The only determination made by the *Butterworth* court was that it lacked jurisdiction to hear the case; all other references to the Johnson Act were dicta at best.

On remand, the Florida state court, found that the Johnson Act

> "legislated an end to discrimination between Registered U.S. vessels and vessels registered under foreign flags. Congress felt that such distinctions were discriminatory and should be eliminated. It did so under the 1992 amendments to the JOHNSON ACT (15 USCA). In doing so it did allow the states to 'opt out' of the exemption by regulating the 'cruise to nowhere industry,' if the individual states desired to do so. The provision did not adopt existing proscriptions but indicated each state must pass legislation to avoid the exemption for cruise ships carrying gambling equipment operating under U.S. Flag registration."

Butterworth v. Chances Casino Cruises, Inc., CA 97-1088 (Fla.Cir.Ct. July 23, 1997), at 1. The Florida state court continued that "[t]he State of Florida chose NOT to opt out of the provisions of the exemption by allowing regulatory legislation to die in committee in both houses of the Florida Legislature. . . . Thus, the State of Florida chose not to 'opt out' of the U.S. Flag registration exemption by allowing gambling apparatus on such 'cruise to

nowhere' vessels." After being remanded, *Butterworth* supports Plaintiff's position.

3. GEORGIA

The Attorney General of Georgia has concluded that to escape the effect of the 1992 amendments to the Johnson Act, Georgia must pass specific legislation to opt out of the amendments. Georgia Unofficial Att'y Gen. Op. No. U92-20. The question presented to the Georgia Attorney General regarded the "[a]pplicability of Georgia's gambling and related statutes to the use and possession of gambling devices on vessels operating cruises to nowhere from ports located in Chatham County, Georgia." The Georgia Attorney General concluded as follows:

> Having legislated a general rule and exception, it is my view that unless Georgia has "enacted a statute the terms of which prohibit that repair, or use on that voyage or segment" of a voyage, the Johnson Act amendments would preempt any contrary or inconsistent Georgia law. . . .
>
> Georgia's gambling device statute does not expressly contemplate carriage of the devices on either foreign or American flagged vessels. It has no language which applies to the repair, possession or use of gambling devices, on voyages beginning and ending in Georgia. Since 15 U.S.C. § 1175(b)(2)(A) requires specific state legislation to remove the state from the Act's expansive exception, I must conclude that O.C.G.A. § 16-12-24(a) cannot be enforced in the circumstances contemplated by the Johnson Act as amended. To permit enforcement of O.C.G.A.

> § 16-12-24's prohibitions, additional legislation would be necessary.
>
> Similarly, other statutes, such as O.C.G.A. § 16-12-23 (keeping a gambling place), O.C.G.A. § 16-12-22 (commercial gambling) and O.C.G.A. § 16-12-26 (advertising commercial gambling) also appear to be unenforceable under these circumstances by virtue of this congressional preemption. Additional legislation would be necessary to make the underlying activities unlawful before these peripheral statutes could be enforced.
>
> In conclusion, it is my unofficial opinion that the 1992 amendments to the Johnson Act (15 U.S.C. § 1175) have preempted Georgia's statute prohibiting the possession of gambling devices (O.C.G.A. § 16-12-24) as applied to foreign or U.S. registered vessels where all gambling activity takes place beyond the state's three-mile territorial limits, and the gambling devices remain on board when the vessel is in a Georgia port. However, the provisions of the Johnson Act amendments permit the state to enact future legislation to prohibit the repair or use of such devices on vessels beginning and ending voyages in Georgia ports.

This informal opinion from Georgia's Attorney General supports Plaintiff's position.

4. OTHER COASTAL STATES

Since the bench trial, Plaintiff has submitted additional argument and documentation that suggest that

New York, New Jersey, and Massachusetts have legislation pending that would opt those states out of § 1175. Because it was cumulative evidence submitted after trial, this court has not considered this evidence in reaching the conclusions in this order. Such evidence would appear to suggest that the legislatures of other coastal states disagree with Defendants' arguments or that everyone is out of step but South Carolina.

IV. PERMANENT INJUNCTION

Plaintiff has requested a permanent injunction enjoining South Carolina law enforcement from enforcing certain of its criminal statutes against it. The standard for granting a permanent injunction is the same as that for preliminary relief, except that the court must consider plaintiff's actual success on the merits rather than his likelihood of success. *Amoco Production Co. v. Village of Gambell,* Alaska, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.Ed.2d 542, (1987) (internal citation omitted). By order dated July 21, 1998 this court denied Plaintiff's motion for a preliminary injunction for the reasons stated therein.

During the bench trial, neither party addressed this court's July 21 denial of Plaintiff's motion for a preliminary injunction or Plaintiff's entitlement to a permanent injunction. Specifically, Plaintiff did not argue that it lacked an adequate remedy at law or that any damages it would suffer would be irreparable.

V. CONCLUSION

Oh, we got trouble –
Right here in Georgetown County.
We've surely got trouble –
Right here in Georgetown County.
Oh yes we got trouble here,
We got big, big trouble.
With a capital "T" –
And that rhymes with "sea"
Which is where the gambling will be.

The South Carolina General Assembly could outlaw day cruises tomorrow and Plaintiff and any business like it would be lawfully put out of business. Until the South Carolina General Assembly enacts such legislation, it is

ORDERED that Plaintiff be awarded judgment on its first cause of action for declaratory judgment.

South Carolina has not enacted any statute opting out of the 1992 amendments to the Johnson Act and the statutes South Carolina adopted prior to the 1992 amendments to the Johnson Act, S.C.Code Ann § 12-21-2710; S.C.Code Ann. § 12-21-2712; S.C.Code Ann. § 16-19-10; S.C.Code Ann. § 16-19-20; S.C.Code Ann. § 16-19-30; S.C.Code Ann. § 16-19-40; S.C.Code Ann. § 16-19-50; S.C.Code Ann. § 16-19-120; and S.C.Code Ann. § 16-19-130, do not meet the criteria of the opt out provisions of 15 U.S.C. § 1175; and it is further

ORDERED that Plaintiff's request for a permanent injunction be DENIED without prejudice.

AND IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
August 2, 1999

No. 98-2653
CA-98-1923-18-2

CASINO VENTURES

Plaintiff - Appellee

v.

ROBERT M. STEWART, in his official capacity as Chief of the State Law Enforcement Division; CHARLES M. CONDON, Attorney General

Defendants - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

SOUTH CAROLINA CODE PROVISIONS

Section 16-19-10. Setting up lotteries.

Whoever shall publicly or privately erect, set up, or expose to be played or drawn at or shall cause or procure to be erected, set up, or exposed to be played, drawn, or thrown at any lottery under the denomination of sales of houses, lands, plate, jewels, goods, wares, merchandise, or other things whatsoever or for money or by any undertaking whatsoever, in the nature of a lottery, by way of chances, either by dice, lots, cards, balls, numbers, figures, or tickets or who shall make, write, print or publish, or cause to be made, written, or published any scheme or proposal for any of the purposes aforesaid is guilty of a misdemeanor and, upon conviction, must be fined one thousand dollars and imprisoned for one year. One-third of the fine imposed shall be paid to the person, if any, who informed law enforcement officials or other appropriate authorities about the violation which led to the conviction. Each violation constitutes a separate offense.

Section 16-19-40. Unlawful games and betting.

If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank or (f) any other table or bank of the same or the like kind under any denomination whatsoever, except the games of

billiards, bowls, backgammon, chess, draughts or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts or whist, or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or shall suffer a fine of not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place or house used as a place for gaming or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense.

Section 16-19-130. Betting, pool selling, bookmaking and the like are prohibited.

Any person within this State who:

(1) Engages in betting at any race track, pool selling or bookmaking, with or without writing, at any time or place;

(2) Keeps or occupies any room, shed, tenement, booth, building, float or vessel, or any part thereof, or occupies any place or stand of any kind upon any public or private grounds within this State with books, papers, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling pools;

(3) Records or registers bets or wagers or sells pools or makes books, with or without writing, upon the result of any (a) trial or contest of skill, speed or power of endurance of man or beast, (b) political nomination,

appointment or election or (c) lot, chance, casualty, unknown or contingent event whatsoever;

(4) Receives, registers, records or forwards or purports or pretends to receive, register, record or forward, in any manner whatsoever, any money, thing or consideration of value bet or wagered or offered for the purpose of being bet or wagered by or for any other person or sells pools upon any such result;

(5) Being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float or vessel, or part thereof, or of any grounds within this State knowingly permits the same to be used or occupied for any of these purposes or therein keeps, exhibits or employs any device or apparatus for the purpose of recording or registering such bets or wagers or the selling of such pools or becomes the custodian or depository for gain, hire or reward of any money, property or thing of value staked, wagered or pledged or to be wagered or pledged upon any such result; or

(6) Aids, assists or abets in any manner in any of the aforesaid acts, which are hereby forbidden;

Shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding six months, or both fine and imprisonment, in the discretion of the court.

Section 16-19-50. Keeping unlawful gaming tables.

Any person who shall set up, keep or use any (a) gaming table, commonly called A, B, C, or E, O, or any gaming

table known or distinguished by any other letters or by any figures, (b) roley-poley table, (c) table to play at rouge et noir, (d) faro bank or (e) any other gaming table or bank of the like kind or of any other kind for the purpose of gaming except the games of billiards, bowls, chess, draughts and backgammon, upon being convicted thereof, upon indictment, shall forfeit a sum not exceeding five hundred dollars and not less than two hundred dollars.

Section 16-19-120. Officers shall destroy gambling devices after confiscation.

All officers of the law in whose care, possession or keeping may be placed any gambling or gaming machine or device of any kind whatsoever or any gambling or gaming punchboard of any kind or description whatsoever which has been confiscated for violation of any criminal law or laws of this State shall immediately after conviction of the violator of the law destroy the same.

Section 12-21-2710. Types of machines and devices prohibited by law; penalties.

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers

to the player or in the machine, but the provisions of this section do not extend to coin-operated nonpayout pin tables, in-line pin games, and video games with free play feature which meet the technical requirements provided for in Section 12-21-2782 and Section 12-21-2783, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.

Any person violating the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.

Section 12-21-2712. Seizure and destruction of unlawful machines, devices, etc.

Any vending or slot machine, punch board, or other device pertaining to games of chance prohibited by Section 12-21-2710 must be seized by any officer of the law and at once taken before any magistrate of the county in which the machine, board, or device is seized who shall immediately examine it, and if he is satisfied that it is in violation of Section 12-21-2710 or any other law of this State he shall direct that it be immediately destroyed.

COMMITTEE REPORT

H.R. Rep. No. 357, 102ND Cong., 1ST Sess. 1991, 1991 WL 251350 (Leg.Hist.)

UNITED STATES-FLAG CRUISE SHIP
COMPETITIVENESS ACT OF 1991
HOUSE REPORT NO. 102-357

November 22, 1991

[To accompany H.R. 3282]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 3282) to provide for the equity of revenue availability on American and foreign cruise vessels, the regulation of gaming on vessels, penalties for gambling violations, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "United States-Flag Cruise Ship Competitiveness Act of 1991".

SEC. 2. CLARIFICATION OF, AND LIMITATION ON, GAMBLING DEVICES RESTRICTION.

Section 5 of the Act of January 2, 1951 (15 U.S.C. 1175), commonly referred to as the Johnson Act, is amended –

(1) by inserting before "It shall be unlawful" the following: "(a) General Rule. –";

(2) by inserting before the period at the end the following:", including on a vessel documented under chapter 121 of title 46, United States Code, or documented under the laws of a foreign country"; and

(3) by adding at the end the following:

"(b) Exception.–

"(1) In general. – Except as provided in paragraph (2), this section does not prohbit the repair, transporation, possession, or use of a gambling device on a vessel that is on a voyage or a segment of a voyage on waters that are–

"(A) not in the jurisdiction of any State, possession of the United States, or foreign country; or

"(B) otherwise in the admiralty and maritime jurisdiction of the United States and not in the jurisdiction of any State or possession of the United States.

"(2) Application to certain voyages and segments.–

"(A) General rule. – Paragraph (1) applies to the repair, transportation, possession, or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) only if the State or possession of the United States in which the voyage or segment begins and ends has not enacted a statute that prohibits that repair, transportation, possession, or use.

"(B) Voyages and segments described. – A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively–

"(i) that begins and ends in the same State or possession of the United States, and

"(ii) during which the vessel does not make an intervening stop in another State or possession of the United States or a foreign country.".

Amend the title so as to read:

A BILL to amend the Act commonly referred to as the Johnson Act, to give the same treatment to the repair, transportation, possession, or use of gambling devices on certain United States-flag vessels as is given to that activity on foreign-flag vessels.

PURPOSE OF THE BILL

The purpose of H.R. 3282, as amended, is to legalize gambling on U.S.-flag vessels operating beyond the territory of a State if the vessel is not used principally for the operation of a gambling establishment and to grant to the States and possessions of the United States the authority to regulate certain voyages, or segments of voyages, that begin and end in their State or possession.

BACKGROUND AND NEED FOR LEGISLATION

Gambling is prohibited on U.S.-flag vessels unless it occurs on a vessel making a voyage exclusively on waters of a State which has legalized gambling on vessels within its jurisdiction. Foreign-flag vessels with gambling equipment on board may enter the territorial sea of the United States; however, the gambling equipment may not be used once the vessel has entered our territorial waters unless allowed under State law in that State's waters.

Today, there are only two large U.S.-flag cruise vessels, both of which operate in the Hawaiian inter-island

trade. To comply with Federal law, they do not offer gambling. Many foreign-flag cruise vessels offer forms of gambling as an amenity for their passengers. None of the Caribbean Sea cruise ships fly the U.S. flag, even though many of the ships and passengers depart from the U.S.

The Cruise Lines International Association has estimated that the North American cruise market was 3.5 million passengers that spent approximately $4.5 billion for cruises in 1989. It has also been estimated that U.S. citizens wagered approximately $1.8 billion at sea in 1990, none of which was spent on U.S.-flag cruise vessels.

There are currently approximately 75 foreign-flag cruise ships serving U.S. ports with total passenger capacity of 80,765. However, the only two U.S-flag cruise ships serving U.S. ports have a total passenger capacity of only 1,550.

Legalization of gambling on board U.S.-flag vessels will provide two major incentives to the acquisition of new vessels in the U.S. fleet. First, revenues from gambling can enhance the financial viability of a commercial venture. Second, gambling serves as a major source of entertainment on board the vessels.

Placing more cruise ships in the U.S. fleet will add more ships to our merchant marine, provide military sealift capacity, improve our Nation's balance of trade, create jobs for Americans both ashore and afloat, maintain our manpower base needed to support sealift efforts during a war or national emergency, and help maintain our shipbuilding industrial base. Enactment of H.R. 3282 will enhance the likelihood of these beneficial developments at no cost to the Federal Government.

In addition to the more traditional passenger cruise ships which usually visit multiple ports on voyages lasting several days, there are foreign-flag vessels with gambling facilities that have operated on so-called "voyages-to-nowhere". On a typical trip, the vessel leaves a U.S. port, opens its gambling facilities once it has left the U.S. territorial sea (usually three miles seaward), and allows its passenges [sic] to gamble for several hours before returning to its port of embarkation. The gambling facilities are closed upon reentering the U.S. territorial sea. However, the Department of Justice has traditionally been concerned about the penetration of organized crime into the gambling ship trades. Therefore, the Attorney General issued an advisory opinion in April 1991, construing the Gambling Ship Act. Under the opinion, a vessel would be prohibited from engaging in gambling unless it went to a foreign port or was on a voyage of more than 24 hours with food and staterooms for all the passengers on board.

A recent phenomenon has been the return of riverboat gambling vessels, primarily on the Mississippi River. Several States, notably Iowa and Illinois, have enacted statutes regulating and encouraging riverboats offering gambling on certain rivers within their jurisdiction.

During the 101st Congress, on October 3, 1990, the Subcommittee conducted a hearing to examine gambling on vessels. Considered at that time were H.R. 5533 – to provide for restricting foreign-flagged gambling vessels, and H.R. 5534 – to provide for safety and competitiveness on vessels documented as vessels of the United States. (See Printed Hearing Serial No. 101-122)

The subject of gambling on vessels is addressed by two Federal statutes: chapter 50 of title 18, United States Code, commonly referred to as the Gambling Ship Act; and the Act of January 2, 1951 (15 U.S.C. 1171-1178), commonly referred to as the Johnson Act or the Gambling Devices Act.

GAMBLING SHIP ACT

Chapter 50 of title 18, United States Code, prohibits American citizens, residents, or others under U.S. jurisdiction from owning, operating, or holding an interest in a "gambling ship" unless the vessel is operating solely within the waters of a State.

Section 1081 of title 18 defines a "gambling ship" as "a vessel used principally for the operation of one or more gambling establishments." Thus, it is possible for certain foreign-flag vessels to offer gambling and yet not run afoul of the prohibitions in the Gambling Ship Act.

On April 16, 1991, Attorney General Richard Thornburgh issued the following policy instruction to U.S. Attorneys:

In making a prosecutorial determination whether a particular ship is a gambling ship within the meaning of this definition, it will be presumed that a ship which operates one or more gambling establishments on board is a "gambling ship", unless it cruises for a minimum 24 hours with meals and lodging provided for all passengers or unless it docks at a foreign port.

Under this interpretation of chapter 50 of title 18, most voyage-to-nowhere cruises would be prohibited

from engaging in gambling operations. Thus, while this law applies to both U.S.- and foreign-flag vessels, it is not an absolute ban on gambling on vessels.

H.R. 3282, as amended, does not make any changes to chapter 50 of title 18, United States Code. Therefore, the operation of a "gambling ship" that is owned or operated by a U.S. citizen or resident will continue to be prohibited.

JOHNSON ACT OR GAMBLING DEVICES ACT

Section 5 of the Act of January 2, 1951 (15 U.S.C. 1175), commonly referred to as the Johnson Act or the Gambling Devices Act, prohibits the repair, transportation, possession, or use of gambling devices on U.S.-flag vessels except on vessels operating exclusively within the jurisdiction of a State which has legalized gambling on those vessels.

Section 5 of the Johnson Act states:

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18, United States Code, or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18, United States Code.

It is the Gambling Devices Act that acts as an absolute bar to gambling on U.S.-flag vessels that engage in

interstate and foreign commerce. The Department of Justice testified before the Committee that it has never interpreted the Johnson Act as applying to foreign-flag vessels.

H.R. 3282

On August 2, 1991, Congressman Gene Taylor introduced H.R. 3282, the United States-Flag Cruise Ship Competitiveness Act of 1991. The bill, as reported, has been substantially amended.

H.R. 3282, as amended, would legalize gambling on U.S.-flag vessels if the principal use of the vessel is other than the operation of a gambling establishment and if the gambling begins only when the vessel sails beyond State waters. Therefore, gambling could occur on U.S.-flag cruise ships or dinner cruises that sail beyond the territorial sea. However, gambling could not take place on a vessel that is a floating casino in which the principle purpose of the vessel is the operation of a gambling establishment.

H.R. 3282, as amended, does not change the effect of current law allowing gambling on U.S. flag-vessels in State waters and on foreign-flag "traditional" cruise ships. However, gambling on so-called "voyages-to-nowhere" and voyages between two points in a State would be prohibited if the State from which they are operating has a law prohibiting gambling activities on these voyages. A "voyage-to-nowhere" is a voyage in which a vessel departs a place in the United States, sails to a point beyond the territorial sea, and returns to the same place.

For example, the State of Hawaii has enacted a law (chapter 72 of the Hawaii Revised Statutes) prohibiting gambling activities on a vessel that embarks from any point within the State, and disembarks at the same or another point within the State, except on travel from the Continental United States or a foreign country. Therefore, under H.R. 3282, as amended, gambling would be prohibited on any U.S. or foreign-flag vessel that is on a voyage, or a segment of a voyage, that sails from a place in Hawaii and returns to that same place or that sails from one place in Hawaii to another place in Hawaii.

The types of segments of a voyage covered under these restrictions are those legs of a larger voyage during which the vessel leaves one point in a State and arrives either at the same point or another point in the same State, without an intervening stop in another State or a foreign country. This segment may include periods of time during which the vessel is operating in international waters. Therefore, a vessel leaving either California or Mexico could have gambling activities on board until the vessel reaches Hawaiian waters. Then, the gambling facilities must be closed. The vessel would not be allowed to have gambling operations during the segments of the voyage during which it is sailing to other islands in Hawaii. However, when the vessel departs Hawaii for California or Mexico, gambling operations could begin when the vessel leaves Hawaiian waters.

The limited delegation of authority by the Federal Government to allow a State to prohibit gambling on vessels where the voyage begins and ends in the same State but departs a State's waters and enters international

waters should not be construed as authorizing enactments by a State that discriminate [sic] against U.S.-flag vessels. The clear intent and purpose of this amendment to the Johnson Act is to allow those activities on U.S.-flag vessels to the same extent that they are currently allowed on foreign-flag vessels. For instance, a State statute that authorizes the use or possession of gambling devices on foreign-flag vessels but specifically prohibits that same activity on U.S.-flag vessels is beyond a State's authority granted in section 2 of H.R. 3282. Finally, nothing in H.R. 3282 should be construed as negating or in any way affecting the validity of provisions relating to the transportation of gambling devices in section 2 of the Johnson Act (15 U.S.C. 1172).

The ability of United States to enforce these restrictions on foreign-flag vessels when they are operating in international waters is governed by customary international law. Accordingly, the United States may board the vessel in international waters to enforce these restrictions with the permission of the flag state of the vessel. Also, if a vessel does violate these restrictions, the vessel may be denied entry into the United States for all future voyages since it has violated a law of the United States.

COMMITTEE ACTION

On October 10, 1991, the Subcommittee on Merchant Marine conducted a hearing on H.R. 3282. Witnesses included representatives of the Maritime Administration (Department of Transportation), Department of Justice, maritime labor, and potential U.S.-flag cruise ship operators.

On November 14, 1991, the Subcommittee on Merchant Marine marked up H.R. 3282. An amendment in the nature of a substitute was offered by Mr. Taylor to:

(1) overturn a long-standing Customs Service ruling by subjecting certain voyages-to-nowhere to application of the coastwise laws found in section 27 of the Merchant Marine Act, 1920 (the Jones Act);

(2) grandfather existing operators that reflag their vessels;

(3) legalize gambling on U.S.-flag cruise ships; and

(4) legalize gambling on U.S.-flag vessels engaged on voyages-to-nowhere if those voyages are legalized by the State from which they operate.

Mr. Lent offered an amendment to the Taylor Substitute to strike section 2 (which brought voyages-to-nowhere within the coastwise trade), and section 4 (which legalized a vessel principally used as a gambling establishment if the gambling occurs beyond the U.S. territorial sea). Mr. Lent's amendment to the Taylor Substitute was adopted by voice vote. Then the Taylor Substitute, as amended, was adopted by voice vote, and the bill was reported to the Full Committee, as amended.

On November 20, 1991, the Committee on Merchant Marine and Fisheries marked up H.R. 3282, as amended. Three amendments were offered en bloc by Chairman Jones. The first amendment removed the current prohibition on repairing gambling devices on board a vessel. The second amendment changed the burden for State restrictions on voyages-to-nowhere. In the bill as reported from the Subcommittee, gambling could not occur on voyages-

to-nowhere unless a State law specifically allows gambling to take place on these voyages. The amendment will allow gambling on voyages-to-nowhere unless the State from which the vessel is operating has a law specifically prohibiting those types of voyages; Hawaii has such a statute. The third amendment changes the official title of the bill to reflect the scope of the legislation as it reported from the Committee. These en bloc amendments were adopted by voice vote. The Committee then ordered the bill H.R. 3282, as amended, reported favorably to the House by voice vote.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE.

Section 1 names the Act the "United States-Flag Cruise Ship Competitiveness Act of 1991".

SECTION 2. CLARIFICATION OF, AND LIMITATION ON, GAMBLING DEVICES RESTRICTION.

The Johnson Act currently prohibits the repair, transportation, possession, or use of gambling devices on U.S.-flag vessels. The Justice Department has testified that it has not interpreted the Johnson Act to apply to foreign-flag vessels entering the United States.

Section 2(2) amends the Johnson Act to make these restrictions apply to U.S.- and foreign-flag vessels alike.

Section 2(3) amends section 5(b) of the Johnson Act to grant a general waiver of the restriction on the repair, transportation, possession, or use of gambling devices when the vessel is not in the jurisdiction of a State or possession of the United States. However, this waiver

does not apply to a vessel engaged on a voyage (or segment of a voyage) that begins and ends in the same State without an intervening stop in another State or foreign country if the State or possession from which the vessel is operating has a law specifically prohibiting the repair, transportation, possession, or use of gambling devices on voyages that begin and end in that State.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment of H.R. 3282, as amended, will have no significant inflationary impact on prices and costs in the operation of the national economy.

COST OF THE LEGISLATION

Clause 7(a) of rule XIII of the Rules of the House of Representatives requires an estimate by the Committee of the costs which would be incurred in carrying out H.R. 3282, as amended. However, clause 7(d) provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

COMPLIANCE WITH HOUSE RULE XI

(1) With respect to the requirements of clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, no oversight findings or recommendations on

the subject of H.R. 3282, as amended, have been made by the Committee during the 102nd Congress.

(2) With respect to the requirements of clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, H.R. 3282, as amended, does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

(3) With respect to the requirements of clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Operations on the subject of H.R. 3282, as amended.

(4) With respect to the requirements of clause 2(1)(3)(C) of Rule XI of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3282, as amended, from the Director of the Congressional Budget Office:

U.S. Congress,

Congressional Budget Office,
Washington, DC, November 22, 1991.
Hon. Walter B. Jones,
Chairman, Committee on Merchant
Marine and Fisheries,
House of Representatives, Washington, DC.

Dear Mr. Chairman:

The Congressional Budget Office has reviewed H.R. 3282, the United States-Flag Cruise Ship Competitiveness Act of 1991, as ordered reported by the House Committee on Merchant Marine and Fisheries on November 20, 1991. H.R. 3282 would remove existing prohibitions on gambling aboard U.S.- flag vessels, under certain conditions and subject to any relevant bans enacted by states or U.S. possessions.

Enactment of this bill would have no impact on the federal budget or on those of state or local governments. H.R. 3282 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis, who can be reached at 226-2860.

Sincerely,
Robert F. Hale,
(For Robert D. Reischauer).

DEPARTMENTAL REPORTS

Representatives of the Maritime Administration (Department of Transportation) and the Department of Justice testified at the Subcommittee on Merchant Marine's hearing on October 10, 1991. In addition, the Committee has received the following letter from the Department of Justice, dated November 19, 1991:

U.S. Department of Justice,
Office of Legislative Affairs,

Washington, DC, November 19, 1991.
Hon. Walter B. Jones,
Chairman, Committee on Merchant
Marine and Fisheries,
House of Representatives, Washington, DC.

Dear Mr. Chairman:

This is to express the appreciation of the Department of Justice for the action of the Subcommittee on Merchant Marine in amending H.R. 3282, the "United States-Flag Cruise Ship Competitiveness Act of 1991," so that it would amend only the Gambling Devices Act. As you will recall, representatives of the Department of Justice have testified that we would have no objection to amending the Gambling Devices Act, which presently prevents the offering of casino gambling on United States flagged vessels engaged in the traditional cruise trade.

As you know, however, we have testified in opposition to any repeal or major amendment of the Gambling Ship Act. That Act makes it illegal to operate a ship on a voyage, the principal purpose of which is gambling. We are pleased that the Subcommittee rejected a proposal that would have rendered the Gambling Ship Act a nullity.

It is our understanding that additional amendments may be offered when the full Committee considers H.R. 3282, as amended, on November 20, 1991. The Department of Justice reaffirms its position of having no objection to amending the Gambling Devices Act to permit United States flagged vessels engaged in the traditional cruise trade to offer gambling. We would urge, however,

that the full Committee not adopt any amendments to the Gambling Ship Act.

The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

W. Lee Rawls,
Assistant Attorney General.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes, in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 5 of the Act of January 2, 1951

AN ACT To prohibit transportation of gambling devices in interstate and foreign commerce

Sec. 5. (a) General Rule. – It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of title 18 of the United States Code or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code, including on a vessel

documented under chapter 121 of title 46, United States Code, or documented under the laws of a foreign country.

(b) EXCEPTION. –

(1) In General. – Except as provided in paragraph (2), this section does not prohibit the repair, transportation, possession, or use of a gambling device on a vessel that is on a voyage or a segment of a voyage on waters that are –

(A) not in the jurisdiction of any State, possession of the United States, or foreign country; or

(B) otherwise in the admiralty and maritime jurisdiction of the United States and not in the jurisdiction of any State or possession of the United States.

(2) Application to certain voyages and segments. –

(A) General rule. – Paragraph (1) applies to the repair, transportation, possession, or use of a gambling device on a vessel that is on a voyage or segment of a voyage described in subparagraph (B) only if the State or possession of the United States in which the voyage or segment begins and ends has not enacted a statute that prohibits that repair, transportation, possession, or use.

(B) Voyages and segments described. – A voyage or segment of a voyage referred to in subparagraph (A) is a voyage or segment, respectively –

(i) that begins and ends in the same State or possession of the United States, and

(ii) during which the vessel does not make an intervening stop in another State or possession of the United States or a foreign country.

H.R. REP. 102-357, H.R. Rep. No. 357, 102ND Cong., 1ST Sess. 1991, 1991 WL 251350 (Leg.Hist.)

CONGRESSIONAL RECORD

1992 WL 12455 (Cong.Rec.)
Congressional Record – House of Representatives
Proceedings and Debates of the 102nd Congress, Second Session

Tuesday, January 28, 1992

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The Chair recognizes the gentleman from North Carolina <MR. JONES>.

Mr. JONES of North Carolina.

* * *

Another title is the U.S.-Flag Cruise Ship Competitiveness Act which also passed under suspension no [sic] November 23, 1991.

This will permit U.S.-flag cruise vessels to offer gambling to their passengers when embarked on cruises on the high seas.

We had a lengthy discussion on the floor about this on November 23, 1991. I simply want the Members to understand that this will enable our U.S. vessels to operate on a level playing field with foreign flag cruise ships with respect to gambling.

* * *

Mr. DAVIS.

Section 202 of title II would amend the Gambling Devices Act to allow gambling on U.S.-flag vessels if the principle use of the vessel is not the operation of a gambling establishment and if the gambling that is

allowed begins when the vessel sails beyond a State's water. In essence, U.S.-flag vessels will be allowed the same privileges currently allowed or provided to foreign-flag operators. Nothing in this bill will harm existing foreign operators. Section 202 is virtually identical in legal effect to H.R. 3282, which passed the House under suspension on November 23, 1991, with the addition of provisions relating to the transportation of gambling devices.

Individual States are granted or delegated greater authority to enact legislation to prohibit gambling on cruises to nowhere and voyages between two points in the same State even if the vessel leaves State waters. However, nothing in H.R. 3866 or its limited delegations is to be construed as authorizing a State to enact statues [sic] which discriminate against U.S.-flag vessels.

The clear intent and purpose of this amendment to the Johnson Act is to allow those activities on U.S.-flag vessels to the same extent that they are currently allowed on foreign-flag vessels. For instance a State statute that authorized the use or possession of gambling devices on foreign-flag vessels but specifically prohibited that same activity on U.S.-flag vessels is beyond a State authority granted in title II of H.R. 3866. In contrast to the Hawaii statute concerning cruises to nowhere, which on its face is consistent with the provisions contained in H.R. 3866, the Florida statute (Law 1987, C87-225 § 2; codified at title 44, § 849.231(3)) would not be consistent with the provisions contained in H.R. 38566. The Florida statute unlike the Hawaii statute was enacted solely for the purpose of legalizing cruises to nowhere from its ports. Because of the provisions of the so-called Customs' seal (19 U.S.C.

§ 1446; 29 CFR §§ 4.7-4.87), foreign-flag vessels are exempt by Federal law from State gambling device [sic] prohibiting on all voyages except for cruises to nowhere. The Florida statute, therefore, had no applicability except to these cruises. The statute excluded U.S.-flag vessels from the exemption because, at the time of enactment in 1987, the possession, transportation, and use of gambling devices was expressly prohibited on U.S.-flag vessels by the Federal Gambling Devices Act. Florida could not have passed a statute which contradicted Federal law or in other words allowed those activities on cruises-to-nowhere where the Federal law prohibited such activity. H.R. 3866 expressly removes the prohibition that sanctioned the Florida enactment. H.R. 3866, as passed by the Senate particularly with respect to changes to section 2 of the Johnson Act as they relate to transportation of gambling devices, goes even further than H.R. 3282 with respect to preventing discrimination against U.S.-flag vessels.

* * *

Mr. LENT.

Mr. Speaker, I rise in support of H.R. 3866. This legislation will permit U.S.-flag cruise vessels to offer gambling to their passengers when embarked on cruises on the high seas. Currently, foreign-flag cruise ships departing from U.S. ports offer gambling but it is against the law for a U.S. ship to have gambling onboard. This prohibition has limited opportunities for American interests to engage in the profitable cruise ship trade.

H.R. 3866 changes the law so that both American and foreign-flag cruise ships will operate under the same rules regarding gambling onboard.

By allowing U.S.-flag vessels to have gambling devices onboard we will open doors for U.S. companies to acquire cruise vessels. The revenues received from gambling operations will allow American interests to design and construct new cruise ships in American shipyards to begin competing with the foreign-flag operations.

In addition to providing increased ship construction opportunities for American shipyards, new U.S.-flag cruise ships will mean additional sealift capacity for carrying military troops and it will create jobs for American seafarers who are sorely needed as a result of the decline in our merchant marine. All of these benefits will accrue without any cost to the Federal Government.

Mr. Speaker, the Merchant Marine and Fisheries Committee very carefully crafted this legislation as an amendment to the so-called Gambling Devices Act. It will allow the possession and operation of gambling equipment on U.S.-flag vessels to the same extent that gambling is allowed on foreign-flag vessels. This bill does not affect in any way the current prohibitions in the Gambling Ship Act, which make it illegal to operate a vessel that is principally engaged in gambling as a floating casino.

This bill preserves the right of a coastal State to enact legislation that prohibits gambling on a vessel that operates from a port of that State even if the vessel sails from that port out into international waters and then returns to

the same port. The committee was aware that a number of coastal States do not want gambling on vessels in their waters and this legislation retains the right of States to continue to prohibit gambling.

Mr. Speaker, the prohibitions contained in the Gambling Devices Act have represented an economic barrier to the growth of the U.S.-flag cruise ship industry. This legislation will remove that economic barrier and provide an incentive for American businesses to build ships and begin operating in this extremely lucrative cruise ship trade.

The Department of Justice supports this bill.